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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NUMBER 78-1350

WESLEY J. LEONARD,

Petitioner-Appellant

VERSUS

EXXON CORPORATION and/or NICHOLS CONSTRUCTION CORPORATION, and FIREMAN'S FUND INSURANCE COMPANY,

Defendants-Appellees

THE PETITION OF WESLEY J. LEONARD FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals, rendered October 6, 1978, and appearing at 581 F.2d 522 (5th Cir., 1978), is reprinted as Appendix A herein. The denial of the petition for rehearing, rendered December 4, 1978, is reprinted as Appendix B. The judgment of the United States District Court, Middle District of Louisiana, granting defendants-appellee's motion for summary judgment on March 31, 1976, is reprinted as Appendix C herein. The findings of fact and conclusions of law of the District Court, rendered June 15, 1976, are reprinted as Appendix D herein, and the Judgment of the District Court, also rendered June 15, 1976, is reprinted as Appendix E.

JURISDICTION

The opinion and judgment of the United States Fifth Circuit Court of

Appeals for which this Writ of Certiorari is sought were rendered on October 6, 1978.

The order denying a rehearing by that court was rendered on December 4, 1978.

The jurisdiction of this court over this petition for certiorari is conferred by 28 U.S.C. 1254(1) which permits review by the United States Supreme Court to any party by writ of certiorari.

QUESTIONS PRESENTED

1. Should threshold questions of status involving "vessels" and "seamen" under 46 U.S.C. 688, the Jones Act, be decided as a matter of law through summary proceedings, thereby circumventing the right to trial by jury granted seamen, when there exists genuine issues as to material facts regarding such status and conflicting inferences from those facts could lead to different conclusions among reasonable men?

2. If non-diverse defendants are dismissed from an action by summary proceedings and no remaining theories of liability are or can be asserted against such non-diverse defendants upon the facts presented, should petitioner be entitled to a trial by jury, pursuant to the rules governing civil actions, when complete diversity exists with respect to the remaining defendant, the pleadings have been expanded to include diversity as an alternate basis of jurisdiction, and no Rule 9(h), Federal Rules of Civil Procedure, identifying statement asserting the cause in admiralty has been filed?
3. Should the finding of the District Court that there existed no negligence by any defendant in the case at bar be set aside when review of the case demonstrates the record is replete with

many instances of negligence and that the findings by the District Court are clearly erroneous, pursuant to Rule 51, Federal Rules of Civil Procedure?

STATUTORY PROVISIONS INVOLVED

1. Jones Act, 46 U.S.C. § 688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

2. Federal Rules of Civil Procedure, Rule 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

3. Federal Rules of Civil Procedure, Rule 9(h)

(h) Admiralty and maritime claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

STATEMENT OF THE CASE

Wesley J. Leonard filed this action against Nichols Construction Company (Nichols), his employer, Fireman's Fund Insurance Company (Fireman's Fund), Nichols' insurer, and Exxon Corporation (Exxon) for personal injuries sustained on August 26, 1974. This petition for certiorari is submitted by plaintiff, Wesley J. Leonard, following a decision adverse to plaintiff by the United States Fifth Circuit Court of Appeals.

The accident from which this action stems occurred at the site of a construction project by Nichols on the Mississippi River near the Exxon plant at Baton Rouge, Louisiana.

Nichols entered into a contract with Exxon whereby Nichols was to construct a pipeline which would connect the Exxon dock located some distance from shore with its shore-side facility. This pipeline was

essential to permit deep-draft ocean-going ships to load and unload petroleum products from a location in the Mississippi River some distance from the bank of the River.

In order to construct and transport this pipeline, Nichols assembled a work area consisting of three barges backed together. These barges were attached end-to-end and were positioned parallel to the bank, but on the "water" side of a stationary barge which was secured to the bank. A crane used in the pipeline fabrication process was mounted on the stationary barge. The three barges were tied to the stationary barge and also secured to two tie-up dolphins on the bank by means of cables. It was necessary that the entire work area be accessible to the crane and accordingly, the barges were often untied, repositioned and resecured.

The pipeline under construction was built in sections. As each section was completed, the barges were unsecured and maneuvered into the Mississippi River by means of a tugboat. The tug transported the completed section to the designated area in the Mississippi River in order that it could be attached to the section previously built and positioned. After reaching the correct position, the CP-12 was partially submerged to permit the attachment to those sections already in place. Thereafter, it was refloated and manuevered back alongside the stationary barge.

The barge on which Leonard was injured was known as the CP-12. The CP-12 was designed and equipped for use in navigable waters. It had a raked bow, and was issued a United States Coast Guard certificate of registration and an identification number. It was upon the navigable waters of the Mississippi River at the time of the

accident herein. Although moored at the time of the accident, the two cables and other smaller ropes were by no means permanent. The CP-12 carried United States Coast Guard approved safety equipment, lights, and lifesaving equipment. The barge transported the completed pipeline sections, as cargo, across the navigable waters of the United States.

The plaintiff was employed by Nichols as a foreman supervising all the work being performed aboard the CP-12. The accident giving rise to this suit occurred on August 26, 1974, which was a Monday. Plaintiff had last worked at the construction site on the preceding Friday evening or Saturday morning. However, when Mr. Leonard arrived at work on the Monday in question, he found an assembly of some eight Exxon fuel barges moored to and alongside the barges. This array of fuel barges had been thus positioned on the

previous morning, Sunday, August 25. On Monday morning, shortly after 7 a.m., plaintiff was aboard barge CP-12, which was the up-river barge of the three barges, with a gas permit man, when Leonard observed one of the shore lines unraveling and breaking. The shore line was a five-eighths (5/8") inch cable that secured the CP-12 to the "tie-up dolphin" situated on the bank. The weight or load of the Exxon fuel barges secured to the three barge string had placed too great a strain on the line securing the CP-12 to the river bank.

The plaintiff immediately notified Mr. E. M. Henderson, the project coordinator for Exxon, who in turn called the tug EXXON PENNSYLVANIA to remove the defendant's fuel barges.

It was the plaintiff's intention to remove the two lines fastening the fuel barges to the barge CP-12 as soon as

possible. The weight of the fuel barges was already placing tremendous stress on the CP-12-to-shore cable and Mr. Leonard believed that the wash from the approaching tug would place even more strain on the failing cable.

Consequently, when the Exxon tug was almost in position to remove the barges (shortly before 8 a.m.), the permit man suggested untying the two lines to the fuel barges and the plaintiff agreed. The permit man removed the first line while the plaintiff bent over to remove the second. This action required bending over to the deck of the CP-12 and removing the "eye" of the line from the cavil of the CP-12. While removing the line and casting it over the side, Mr. Leonard's right foot slipped on a foreign substance (sand), and he immediately experienced pain in his back. (It should be noted that the Exxon fuel barges, in addition to

being secured to the construction barge, were primarily fastened to a large landing barge or dock located some distance upstream. Therefore, removing the two lines in question would not result in launching the fuel barges downstream: it simply alleviated the stress on the weakened cable connecting the construction barge to the river bank.)

The Fifth Circuit affirmed the action of the United States District Court wherein Judge E. Gordon West granted Nichols' and Fireman's Fund's Motion for Summary Judgment of April 2, 1976, which contended that, as a matter of law, the CP-12, upon which plaintiff was injured, was not a "vessel". Consequently, plaintiff's Jones Act and unseaworthiness claims were dismissed. However, Judge West did not dismiss Nichols or Fireman's Fund from the case, although no other theory of liability was asserted or could have been asserted

against these parties. Obviously there could be no 905(b) claim without a vessel.

When Nichols' Motion was granted, counsel for plaintiff immediately appealed this action. The Jones Act and unseaworthiness claims were a substantial, if not the major, portion of plaintiff's lawsuit. Plaintiff filed a Notice of Appeal on April 21, 1976. On May 20, 1976, Judge West signed an order retaining the record in the Clerk's office of the District Court, which record was due to be lodged in the Court of Appeals on June 1, 1976. Rather than continue the trial (set for June 14, 1976) until plaintiff could appeal the dismissal of the Jones Act and unseaworthiness claims on specious grounds, Judge West ordered the case heard as originally scheduled.

On May 11, 1976, a pretrial conference was held and attended by counsel for all parties in the action. At this conference,

counsel for plaintiff asserted that as the claims against Nichols and Fireman's Fund had been dismissed and no other theory of liability against these defendants was asserted, there existed complete diversity of citizenship between plaintiff and the remaining defendant, Exxon. Plaintiff thus expanded the basis upon which jurisdiction existed to include diversity as well as the general maritime law, as asserted in the original petition.

On June 7, 1976, seven days before the scheduled trial date, Judge West granted Exxon's Motion to Strike Request for Trial by Jury without prior notification to counsel for plaintiff. There was neither sufficient notice nor an opportunity for a contradictory hearing on this most important issue.

On June 14, 1976, the day of the trial, counsel for plaintiff submitted a Motion to Reconsider Plaintiff's Request

for Trial by Jury directly to Judge West immediately prior to the proceedings. Therein plaintiff withdrew any claim designated under Rule 9(h), Federal Rules of Civil Procedure, against Exxon. Judge West denied this motion, and plaintiff moved for a mistrial, which motion was also denied. Consequently, insofar as plaintiff had alleged general maritime negligence as a basis of jurisdiction, the cause proceeded to trial on the negligence claim without a jury. At the conclusion of the trial, Judge West ruled there was no negligence proven against Exxon or Nichols and judgment was rendered in favor of the defendants and against Leonard. From the judgment on June 15, 1976, plaintiff appealed on the issues of: (1) vessel status; (2) right to a jury trial; and, (3) negligence and unseaworthiness of Exxon and Nichols and their respective vessels.

The Fifth Circuit Court of Appeals affirmed the trial court's denial of vessel status, apparently ignored plaintiff's issue of a right to a trial by jury, and affirmed a finding of no negligence on the part of the defendants. Plaintiff requested a rehearing and this too was denied. Therefore, plaintiff has filed this appeal and writ of certiorari to the United States Supreme Court.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I.

With few exceptions, questions of status under 46 U.S.C. 688, commonly known as the Jones Act, involving "seamen" and "vessels" have traditionally been questions for a jury. Over a long period of time numerous particular factual situations and controversies involving these questions have been addressed by the judiciary. The liberal interpretation accorded the Jones Act has made it exceedingly difficult if

not impossible, to define these terms. The hallmark case of Offshore Company v. Robison, 266 F.2d 769 (5th Cir., 1959), addressing the Jones Act, stated this succinctly:

> "Attempts to fix unvarying meanings having a firm legal significance to such terms as 'seaman,' 'vessel,' 'member of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case."

However, jurisprudence has conceived several exceptions which have become firmly encrusted into the law. For example, floating dry docks were declared not to be vessels in Cope v. Vallette Dry Dock Company, 1887, 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501, if not before, Snyder v. A Floating Dry Dock, D.N.J., 1884, 22 F. 685. Subsequently, when threshold status questions have arisen concerning floating dry

docks, the various Circuit Courts of the United States have held such an issue could be decided summarily as a matter of law, Atkins v. Greenville Shipbuilding Corporation, 411 F.2d 279 (5th Cir., 1969); Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir., 1973), pursuant to Rule 56, Federal Rules of Civil Procedure, without infringing upon a seaman's right to trial by jury under the Jones Act.

In enacting the Jones Act, Congress saw fit to allow juries to decide who are seamen "within broad limits of what is reasonable". Offshore Company v. Robison, supra. Considering the liberal interpretation traditionally applied to the Jones Act, threshold questions of "vessel" status can reasonably be said to fall within the Congressional intent, as the same considerations apply. Producers Drilling Company v. Gray, 361 F.2d 432 (5th Cir., 1966).

In a series of cases beginning with South Chicago Coal & Dock Company v. Basset, 1940, 309 U.S. 251, 60 S.Ct. 544, 80 L.Ed. 732, this Court concluded questions of status are for the trier of facts. Basset was cited in Giafala v. Texas Company, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775, which reinstated a district court's determination that a status issue concerning a man killed on a submersible drilling barge was a question for the jury. Both Basset and Wilkes v. Mississippi River Sand & Gravel Company, 202 F.2d 383 (6th Cir., 1953), stated that in determining whether a person was "a member of a 'crew'", the word "crew" has a "wide range of variation" and that it does not have "absolutely unvarying legal significance". Such status questions are "primarily a question of fact that is to be left to the trier of fact."

In Senko v. LaCrosse Dredging Corporation, 1957, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404, this Court specifically recognized that except in "rare cases", status questions are for the trier of facts. Many Circuit Court decisions have recognized and applied this approach. Offshore Company v. Robison, supra; Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273 (5th Cir., 1966). This language invariably sanctioned the more liberal use of summary procedures in limited factual situations where threshold status issues could be resolved as a matter of law, based upon prior jurisprudence such as Cope v. Vallette Dry Dock, supra. See Atkins v. Greenville Shipbuilding Corporation, supra. The use of summary process in these cases entails a stricter standard of review; the record, including the pleadings, affidavits, and depositions, must negate the probability that evidence

that could persuade reasonable men to draw different conclusions might be developed at trial. Stanley v. Guy Scroggins Construction Company, 297 F.2d 374 (5th Cir., 1961).

Although Senko recognized "in rare cases" exceptions do exist to the general rule that status questions are for the jury, the jurisprudence reflects the liberal interpretation accorded threshold status questions. In the reported cases where status issues have been decided as a matter of law, the facts therein have fallen almost squarely within the parameters of prior cases such as Cope v. Vallette Dry Dock Co., supra. See Atkins v. Greenville Shipbuilding Corporation, supra. The decisions make clear that based upon all the facts and admissions therein, when there exists no genuine issue as to any material fact regarding status, and no conflicting inferences could be drawn

from those underlying facts, a summary decision is proper. However, although status issues are not ipso facto for the jury, if conflicting inferences from one set of facts could lead to differing conclusions among reasonable men, the determination of status, even though marginal, must be made by a jury. Offshore Company v. Robison, supra; Stanley v. Guy Scroggins Construction Co., 297 F.2d 374 (5th Cir., 1961); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir., 1966); Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir., 1966); Barrios v. Louisiana Construction Materials Co., 465 F.2d 1157 (5th Cir., 1972). The Fifth Circuit, in Offshore Company v. Robison, supra has gone so far as to hold that even where the underlying facts are largely undisputed, the determination of status will ordinarily be left to the jury:

> "Attempts to fix unvarying meanings having a firm legal significance to such terms as 'seaman,' 'vessel,'

> 'member of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law, when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts."

In the instant case, the district court notes a few factual similarities bebetween the CP-12 and the floating dry dock in Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir., 1973). Upon this weak predicate the trial court concluded summary disposition of "vessel" status was proper. Cook is distinguishable in several important respects, as discussed later, and should not have been authority for the proposition that, as a matter of law, the CP-12 was not a "vessel". Moreover, the

fact that the three judge appellate panel split two-to-one in its decision that a jury issue was or was not presented demonstrates precisely the fact that conflicting inferences from the facts presented could lead to differing conclusions among reasonable men.

This decision of the Fifth Circuit and District Court has bridged the murky gap between that line of jurisprudence which has utilized summary process to resolve status issues as a matter of law (i.e., cases involving structures which are undisputably not "vessels" [Cope v. Vallette Dry Dock Company, supra]) and cases wherein reasonable men could draw conflicting inferences from one set of facts. It raises the low evidentiary threshold which has heretofore sufficed in Jones Act cases to a much higher level than previously required. As pointed out by Judge Godbold

in his dissent, the majority of the Fifth Circuit panel are uncomfortable with the conclusion they reached on this issue:

> "Nonetheless, we note that Cook and now the instant case deviate from the general practice permitting Jones Act issues to be submitted to the jury, and accordingly should be applied restrictively." at p. 127.

Cook is not valid authority for the decision reached in this case because of factual dissimilarities. As a result, if this decision is maintained, the right of seamen to a jury trial "in a proper case" under the Jones Act will be severely eroded. The lower court's decision contradicts prior jurisprudence and will foster continued infringement upon the rights of seamen to a jury trial when material facts are in dispute and reasonable men might reach different conclusions from conflicting inferences drawn from one set of facts.

There are several critical factual distinctions between Cook v. Belden Concrete Products, Inc., supra, and this case. First and foremost, the structure in Cook alleged to be a "vessel" was characterized in fact as a more or less permanently moored floating dry dock. More accurately, it was a flat deck barge upon which Belden employees fabricated other barges or vessels. During the construction of other vessels, this barge would occasionally be moved slightly to different positions along the dock, and, upon completion of a new vessel or barge, it would be towed into deeper water by tugboats and submerged for launching. This construction platform was neither designed for navigation, nor engaged in navigation at the time of the accident therein. The district court in the instant case focused almost entirely on the singular fact that both the CP-12 and the Cook dry dock were used for

construction purposes. The Court ignored the fact that the CP-12 was designed and equipped for navigation, that it was not permanently moored, and that, in addition to its functions as a construction facility, its major function was to transport its cargo - the completed pipeline sections - across navigable waters. The CP-12 was not a dry dock: it was used neither to construct nor repair vessels. The most expeditious, if not the only, method of installation of the pipeline in the Mississippi River was to construct that pipeline in sections aboard a vessel, the CP-12, which could then be towed from the river bank for placement of the section into the river. It was established long ago that barges are vessels. Norton v. Warner Company, 1944, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931. In determining whether or not a structure is a vessel, the Fifth Circuit in Hicks v. Ocean Drilling and

Exploration Company, 512 F.2d 817 (1975), citing Cook, stated:

> ". . .the purpose for which a facility was constructed and the business in which it is engaged are the controlling considerations in determining whether or not the facility is a vessel." Citing The Robert W. Parsons, 191 U.S. 17, 30, 24 S.Ct. 8, 48 L.Ed. 73 (1903).

The Fifth Circuit has recognized in many instances special purpose structures may be vessels. Hicks v. Ocean Drilling, supra; Offshore Company v. Robison, supra. Several cases indicate that these special purpose "vessels" are structures which serve as something more than a means of transport on water. Producers Drilling Co. v. Gray, supra. The barge CP-12 was part of the three barge assembly used to facilitate the construction and installation of the Exxon pipeline. It should be noted that the CP-12 was not indispensible in the actual construction of the pipeline sections. Those sections could have been

constructed on land. However, the fact that these sections were constructed on the CP-12 only facilitated the primary purpose of the CP-12: to transport these assembled sections across the navigable waters of the Mississippi River and then connect them to the facility under construction in the River; that the actual construction occurred on the CP-12 was, therefore, only incidental to its major purpose.

It would still have been necessary to transport the assembled sections across a part of the River had they been constructed on land, irrespective of the frequency of such trips.

There should be no negative effect on the considerations applicable when attempting to determine if a structure is a "vessel" within the parameters of the Jones Act if, in addition to utilization as a means of transport of cargo across navigable

water, the structure is utilized for construction purposes. In Porche v. Gulf Mississippi Marine Corporation, 390 F.Supp. 624 (E.D.La., 1975), the structure upon which the plaintiff therein was contended to be a member of the crew was remarkably similar to the CP-12. The Porche barge, designated RB-2, was "a barge afloat and engaged in laying pipe in the Gulf of Mexico." The pipeline in Porche was constructed aboard the RB-2. Even though engaged in construction, transportation, and installation of a pipeline in navigable waters, precisely the same functions of the CP-12, the distinguished Judge Alvin Rubin brushed over the "vessel" status issue of the RB-2 by stating:

> ". . .it is now well-settled that such structures are 'vessels'." (Citations omitted.)

The defendant in the instant case "distinguished" Porche from this case by stating the RB-2 in Porche was "a 'barge afloat'

out in the Gulf" and that the RB-2 was "a barge 'floating offshore'." Such a "distinction" is meaningless and should have been recognized as such by the Fifth Circuit. The CP-12 was also a barge afloat; that it was not floating in the Gulf of Mexico is completely irrelevant. The critical element is that the RB-2 and the CP-12 were both located upon the navigable waters of the United States. The fact that the CP-12 was temporarily moored in the Mississippi River is of no moment. To distinguish Porche from this case on the basis that the RB-2 was "floating offshore" as opposed to the CP-12 floating in the Mississippi River demonstrates remarkably little understanding of a fundamental premise upon which the broad definition of "vessel" rests.

In a case which the First Circuit inquired into the status of a construction barge, that Court stated it could not say

as a matter of law that the construction barge was not a "vessel". Bennett v. Perini Corporation, 510 F.2d 114 (1st Cir., 1975). The facts in Bennett relating to the barge bear a strong resemblance to the facts in the instant case. The construction barge in Bennett, designated the "Scow 101", was without motive power of its own, had a crane mounted on its deck, and had to be towed from place to place. The Scow 101 was utilized in construction of a bridge, and there was evidence from which one could infer that it could be moved to other piers along the bridge. At the time of the accident it was moored in navigable water along the pier of the bridge in such a manner that the crane could move materials for the bridge while its deck could be used as a storage area and work platform for the construction crews. A major function of that barge appeared to have been the transportation

of the structural materials and tools used to build the bridge across the navigable waters of a bay. In stating they could not say as a matter of law that "Scow 101 was not a vessel", the court said:

> "Whether a marginal structure is a vessel is a question for the jury unless the craft is clearly outside any permissible understanding of the term."

In citing Cook v. Belden Concrete Products, supra, and recognizing that similarities existed between the Cook structure and Scow 101, that court further stated:

> "In those 'rare cases' where rafts or barges have been held, as a matter of law, not to be vessels, it has often been because of their close similarity to floating docks or dry docks, traditionally regarded as extensions of land."

The Court noted some similarity between the Scow 101 and a dry dock, but recognized another major function: the intermittent transportation of structural materials across navigable waters. This same principle should have operated in the

instant case, and "vessel" status should not have been decided as a matter of law. The Fifth Circuit and the District Court failed to accord the same importance to the major function of the CP-12: transportation of the completed pipeline sections, as cargo, across navigable waters. The Bennett court thought a jury could find the Scow 101 was one of the "special purpose floating structures" which the maritime law has included within that term. Implicit in this statement is the assumption that conflicting inferences could be drawn from the same facts by reasonable men. In the instant case, the fact that the Fifth Circuit split two-to-one demonstrates the same result that might be obtained by a jury. The logical conclusion to be drawn indicates "vessel" status should not have been decided as a matter of law by the trial court in Mr. Leonard's case. In fact, the status of CP-12 in the

instant case is almost factually the same as the Scow 101 in the Bennett decision.

Nichols also argued that neither the CP-12 nor plaintiff were subjected to the elements of risk and hazards of the sea. However, the entire series of events commenced when eight Exxon fuel barges were tied to the CP-12, thereby causing one of two steel cables running from the CP-12 to dolphins on the bank to start unraveling. In addition to breaking the CP-12 mooring lines, the Exxon barges caused buffeting of the barges which in turn damaged the sand coating around the pipeline section under construction. In attempting to untie the mooring lines of the Exxon fuel barges, Mr. Leonard was injured. It should be clear the CP-12 was in danger of breaking away from its mooring and being carried away by the current. Even in its most remote sense, a definition of "hazards of the sea" would encompass the danger

confronted when a vessel or structure is swept away by the current.

The mere fact that the CP-12 was not self-propelled is not determinative of "vessel" status. In many cases involving special purpose structures and barges, especially submergible drilling barges, those structures had no motive power of their own; many are towed or maneuvered by tugboats. Despite this fact, "vessel" status was determined to exist. Producers Drilling Company v. Gray, 361 F.2d 432 (5th Cir., 1966); Offshore Company v. Robison, supra; Hicks v. Ocean Drilling, supra; Davis v. Hill Engineering, Inc., 549 F.2d 324 (5th Cir., 1977).

Plaintiff submits that, although the issue of status is not perforce one of fact for the jury, the Fifth Circuit erred in failing to reverse the decision of the District Court. From the facts in the record, it it clear that conflicting inferences

could be drawn from these facts, thereby leading reasonable men to different conclusions. Under Rule 56, Federal Rules of Civil Procedure, summary judgment is proper only when there exists no genuine issue as to material facts. At the hearing on the motion and on appeal plaintiff established facts sufficient to demonstrate the existence of a genuine issue of material fact. This decision flies into the face of the liberal construction previously accorded cases arising under the Jones Act. Judge West has, in effect, treated Cook v. Belden Concrete Products, Inc., supra, as stating an "unvarying rule of law". Jurisprudence states a wide range of meaning is to be accorded the term "vessel" under the Jones Act; this, coupled with the fact that conflicting inferences may lead to different conclusions among reasonable men based on the facts presented, should have been sufficient to defeat Nichols' motion

for summary judgment. The Leonard decision establishes poor precedent and severely restricts a seaman's right to trial under the Jones Act. The Leonard decision appears to be contrary to prior jurisprudence and attempts to circumvent established procedure in "status" cases.

This Honorable Court has not had the opportunity to review controversies of this nature in recent years. However, it is urged that review is necessary in order to clarify and define the scope of "vessel status" issues under the Jones Act and General Maritime Law, and to check the gradual erosion of a seaman's right to trial by jury on status issues. If the Leonard decision is not reviewed and reversed, the foreseeable result is that every issue of status somewhat analogous to another set of facts will be decided as a matter of law without ever reaching the trier of fact. To allow

this result would be a serious injustice, and would substantially alter the existing maritime jurisprudence. The Court is reminded that "seamen are wards of the court" and their interest should be guarded and protected. The Supreme Court of the United States is presented with an opportunity to protect and define seaman rights in the Leonard case by clearly establishing the guidelines to be followed in determining when and under what circumstances the trier of fact is entitled to determine "vessel status" questions.

II.

The second issue presented to this Honorable Court is whether the trial court erred in denying Leonard's right to a jury trial against Exxon after ruling that no vessel was involved in this action. Plaintiff's contention throughout this case has been that once vessel status was denied, Nichols, the employer of plaintiff, was out of the case leaving only Exxon, and therefore plaintiff is entitled to a jury trial against Exxon since complete diversity existed between plaintiff and Exxon.

Plaintiff maintains that after a close review of the decision of the Fifth Circuit, one will find that that court glossed over the procedural irregularities and errors committed prior to and during the trial of this case and thus failed to address or resolve the more complex issues.

Plaintiff's original complaint alleged a claim under the Jones Act with a

request for a trial by jury. Plaintiff further alleged unseaworthiness and negligence of the barges and their owners, invoking jurisdiction of the federal court under the General Maritime Law. Plaintiff shows that in his complaint there does not exist any designation of a claim under Rule 9(h), Federal Rules of Civil Procedure. When filed, complete diversity between all parties did not exist as Nichols was a Louisiana corporation. At that time, no other basis for federal jurisdiction existed and any Rule 9(h) statement identifying plaintiff's claim to be in admiralty and general maritime law was unnecessary.

When the District Court granted Nichols' motion for summary judgment on vessel status, plaintiff's Jones Act, unseaworthiness and maintenance and cure claims should have been dismissed. When plaintiff attempted to appeal the decision

on this motion, the court withheld the record from the Court of Appeals, refused to grant a continuance and ordered that the trial proceed as scheduled. With the trial court dismissing the Jones Act and unseaworthiness claims, plaintiff's sole remaining theory of liability as alleged in his complaint was one in maritime tort (i.e., negligence). However, the District Court did not simultaneously dismiss Nichols and Fireman's Fund from the action. Plaintiff was not then, and is not now, aware of any theory of negligence allowing any action against his employer, Nichols, to continue in federal court once vessel status was denied.

Assuming, arguendo, that the District Court decided correctly on the motion filed by Nichols and affirmed by the Fifth Circuit, there no longer existed any basis in the pleadings upon which plaintiff could proceed against Nichols or Fireman's

Fund in federal court. The District Court decided there did not exist a "vessel" within the parameters of the Jones Act, thus "seaman" status could not exist, nor could the Jones Act action be maintained. Failing "seaman" status, plaintiff's actions against Nichols, his employer, and Fireman's Fund, were severely restricted. If he was considered a maritime worker, he would fall under the "exclusive remedy" provisions of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (et.seq.), thereby precluding an action in maritime tort. [Any action in negligence under 33 U.S.C. § 905(b) also depends on an initial finding of "vessel" status.] If plaintiff was determined not to be a maritime worker, by the process of elimination he would fall under the "exclusive remedy" provisions of the Louisiana Workmen's Compensation statute, L.S.A.-R.S. 23:1 (et.seq.), again precluding any action

in tort. Plaintiff asserted neither of these claims. In effect, the decision of the District Court in granting Nichols' Motion for Summary Judgment should have eliminated Nichols and Fireman's Fund from the case entirely. In point of fact, the District Court did not dismiss either of these defendants from the case and did not state any reasons for this action. Had that Court dismissed these defendants, as it should have, the sole remaining defendant would have been Exxon. Plaintiff contended on appeal, and so urges this Honorable Court now, that, contrary to the decision of the District Court, Exxon was the only defendant in the trial. Nichols was not a defendant after the trial court granted its motion.

Plaintiff was cognizant of the fact that he was no longer entitled to a jury trial in view of the fact that the court had dismissed his Jones Act claim (whether

correctly or incorrectly). However, plaintiff recognized complete diversity existed after the summary judgment was granted, notwithstanding the actions of the District Court. A pretrial conference was held on May 11, 1976. At that time plaintiff asserted that in addition to the General Maritime Law, jurisdiction would also be based on diversity of citizenship in order that a jury trial might still obtain. Paragraph four (4) of the Pretrial Order states:

> "Jurisdiction is based on the general maritime law, and diversity of citizenship with the amount of damages exceeding Ten Thousand and No/100 ($10,000.00) Dollars.
>
> Exxon Corporation questions whether the plaintiff's cause of action falls within the admiralty jurisdiction of the court or within the diversity jurisdiction of the court."

Plaintiff respectfully submits that dual jurisdiction does not preclude his right to a jury trial on the law side of the court

when his right to a jury is based on diversity jurisdiction. To deny plaintiff's fundamental right to a jury trial does a gross injustice to plaintiff and the jury system.

Exxon's Motion to Strike Trial by Jury was filed June 7, 1976, and granted that same day without prior notification to plaintiff's counsel. The motion alleged jurisdiction was predicated on the general maritime law and that a jury trial is not permitted in such cases. There was no opportunity for a contradictory hearing on the issue of diversity. At the pretrial conference, counsel for plaintiff asserted jurisdiction was based not only upon the general maritime law, but included diversity of citizenship as another basis. In granting Exxon's motion without a hearing, plaintiff was denied his fundamental right to a jury in diversity cases. Romero v. Bethlehem Steel Corporation, 515 F.2d 1249

(5th Cir.,1975), involved somewhat similar facts, but there are important factual dissimilarities in the instant case upon which the Court should have reached a different decision than that obtained in Romero. Therein, Romero's complaint was specifically designated under Rule 9(h). To the pretrial order, which based jurisdiction in admiralty, plaintiff inserted a sentence stating diversity of citizenship was also a basis of jurisdiction, after the language in the order had been agreed upon. Another paragraph of the pretrial order demonstrated there existed a dispute regarding the status of the case as a jury or non-jury trial because of the Rule 9(h) designation. Leonard, however, never brought his action under Rule 9(h). Plaintiff urges that the dual bases of jurisdiction in the pretrial order were admiralty and diversity of citizenship and were sufficient to notify the Court and

Exxon of plaintiff's right to a trial by jury.

Romero states the mere addition to the pretrial order of diversity as a jurisdictional ground is insufficient to notify the court or the opposing party of the intent to expand the jurisdictional base, especially where there is no attempt to withdraw a Rule 9(h) claim. In this case it should be unnecessary to completely withdraw any allegation of admiralty or maritime jurisdiction because there existed no Rule 9(h) designation. Certainly Exxon was notified of plaintiff's right to a diversity cause of action, because Exxon included a paragraph in the order questioning plaintiff's right to proceed in admiralty and on the law side with jurisdiction based on diversity.

Plaintiff's remaining negligence claim against Exxon was cognizable in admiralty or in a civil action, with

diversity of citizenship as the basis for jurisdiction for the civil action. The 1966 amendment to the Federal Rules of Civil Procedure, unifying the admiralty and civil rules, was not intended to change the general rule that admiralty claims are to be tried without a jury. Federal Rules of Civil Procedure, Rules 9(h), 38(e), and Notes of Advisory Committee on Rules. The Advistory Committee notes state:

> "It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute."

After unification, a single form of pleading is sufficient, as the unification abolished the distinction between civil actions and suits in admiralty. Rule 9(h) was drafted as an identification device to enable the pleader to identify his claim either as one in admiralty so that the parties would know whether the special

admiralty remedies and rules of procedure would apply (Advisory Committee Notes; Wright & Miller, Federal Practice and Procedure § 1313 at 453 [1969]), or as a civil action if diversity of citizenship exists. Thus the pleader has within his power to determine the procedural consequences of his cause of action. Advisory Committee Notes, Rule 9(h).

In factual situations where admiralty jurisdiction and some other form of federal jurisdiction exists, a special identifying statement asserting the pleader's claim falls within Rule 9(h) is necessary, or the rules governing civil action will apply. The allegation of admiralty and maritime jurisdiction does not ipso facto make it an admiralty claim within the parameter of Rule 9(h). Banks v. Hanover S.S. Corp., 43 F.R.D. 374 (D.C.Md., 1967).

Wright and Miller, Federal Practice and Procedure § 1313 at 454 (1969),

succinctly stated it thus:

> "If the pleading shows that both admiralty and another basis of federal jurisdiction exist, the suit will be treated as an admiralty claim for purposes of invoking the special admiralty procedures and remedies only if the pleading or court setting forth the matter contains a statement identifying the claim as an admiralty or maritime claim. It is not sufficient merely to allege that the claim is within the admiralty and maritime jurisdiction. Official Forms 2(d) and 15, as amended in 1966, indicate how the pleader may make his choice of procedures clear. If he wishes the rules governing civil actions to apply, the pleader need not so specify. If he wishes to avail himself of the special admiralty rules, it it suggested that he follow the jurisdictional allegation with the statement that: 'This is an admiralty or maritime claim within the meaning of Rule 9(h).' If only grounds for admiralty jurisdiction are shown in the pleading, the claim will be governed by the special rules even in the absence of an identifying statement." (emphasis added)

The language in Romero is consistent with this statement:

> "Fed. R. Civ. P. 9(h) serves only as a device by which the pleader

> may claim the special benefits of admiralty procedures and remedies, including a nonjury trial, when the pleadings show that both admiralty and some other basis of federal jurisdiction exist." citing Wright & Miller (citation omitted).

The statement necessarily implies if the pleader does not utilize the 9(h) "device" to claim the special admiralty benefits, his action will be governed by the rules governing civil actions. After the District Court granted Nichols' Motion for Summary Judgment, the pretrial order makes it clear plaintiff did not intend that admiralty and maritime jurisdiction constitute the sole basis of jurisdiction. Counsel specifically asserted diversity as the other basis of jurisdiction of the District Court over the sole remaining claim against Exxon. Plaintiff did not allege any Rule 9(h) designation of this claim as did the Romero plaintiff. In the absence of the necessary Rule 9(h) identifying statement, plaintiff's claim should have been heard

on the law side of the court, and that claim should have been governed by the rules governing civil actions, including a trial by jury pursuant to 28 U.S.C. § 1333 (the "savings to suitors" clause) and as granted by the Amendment VII of the United States Constitution.

The Fifth Circuit glossed over these issues by holding there was no complete diversity, without any analysis of the dismissal of Nichols or Fireman's Fund in the course of the proceedings. It did not address Romero or the issues raised by Rule 9(h). In effect, the Panel assumed there was no complete diversity simply from the initial allegations in plaintiff's complaint, without analysis of the procedural irregularities involved and without fully understanding that without a vessel, the employer, Nichols, could not stay in the lawsuit; without Nichols, there existed diversity.

Plaintiff did not indirectly attempt to provide notice that there was complete diversity between the parties. The statement in the pretrial order alleged diversity as a basis of jurisdiction with the admiralty and maritime jurisdiction. The absence of any Rule 9(h) identifying statement could only butress plaintiff's position that he intended to try the action under the rules governing civil actions, including a trial by jury. See Wright and Miller cited above.

When the time frame, in which the proceedings below developed, is examined, it becomes apparent that plaintiff had little time to secure a trial by jury after Exxon filed its motion to strike the jury. Immediately prior to trial he submitted a formal motion to the District Court to reconsider his request for a jury trial. Similar action was taken by the plaintiff in Romero. However, therein

appellant made no request, express or implied, to withdraw the Rule 9(h) designation in his complaint. The Fifth Circuit flatly stated withdrawing the Rule 9(h) designation and bringing the entire suit as a civil action would have been sufficient to secure a jury trial because of the diversity issue. In this case, not only did plaintiff not make any Rule 9(h) designation in his pleadings or in the pretrial order, he attempted to withdraw any potential reference to Rule 9(h) by complying with the rules established in Romero.

The District Court and the opposing party were given good cause to believe plaintiff intended to proceed under the rules governing civil actions, based on diversity of citizenship. In addition to the statement in the pretrial order of May 11, 1976, counsel for plaintiff timely submitted Jury Instructions to the

District Court and to opposing counsel on June 4, 1976.

Plaintiff submits that review by this Honorable Court is necessary for several reasons. The decision reached in this case is not consistent with the decision in Romero v. Bethlehem Steel Corporation, supra. Review is also necessary to address the special questions raised in this case when more than one basis of federal jurisdiction is extant and the issues raised by Rule 9(h), Federal Rules of Civil Procedure, are completely ignored by the Circuit Court. The failure of the Circuit Court to address the diversity jurisdiction issue and the Rule 9(h) issue has operated to deny plaintiff his constitutional right to a trial by jury.

III.

The third issue presented to this Court for review concerns the District Court's failure to find negligence on the

part of Exxon and Nichols, and unseaworthiness of the vessels involved. The Fifth Circuit opinion did not even address this issue on appeal.

A brief review of the relevant facts is necessary. The joints of pipe fabricated into the pipeline assembly on the three barge unit were encased in a layer of concrete. When jarred, various sized chunks of the concrete tended to break off, thereby creating a hazardous condition by coating the working surfaces of the barges with sand and other granules of the concrete. Initially, the barges were secured end to end by mooring lines. The barges had a tendency to "walk" or climb on top one another because the barges were without some form of hinge system to keep the three surfaces level. This "bobbing" action which resulted caused damage to the concrete casings. This problem was partially alleviated when Nichols installed

I-beams across the barges to keep the surfaces level, but these I-beams were not sufficient to correct the breaking of the concrete on the pipes.

The concrete casing suffered damage whenever other barges were moored or tied to the three barges herein. In fact, other barges were frequently moored to the Nichols' barges and caused, in the words of Mr. A. J. Shaffer, superintendent for Nichols, ". . .a continuing problem". Exxon barges often tied onto Nichols' barges, and Nichols was aware of the damage to the concrete casing and resultant sand and granules deposited on the deck. (Trial Transcript, p. 16). The cracks created had to be repaired often. Mr. Shaffer testified at trial "it was a continuing problem, keeping these things untied from our barges." (Trial Transcript, p. 16). Nichols had prior knowledge of this problem and the hazardous

condition created, but did not take sufficient action to correct the problem. Particulate matter and sand collected on the barge surfaces the entire time the Exxon barges were moored thereto. Only infrequently did Nichols provide maintenance and custodial personnel, and none were provided on the day of plaintiff's accident.

Exxon was negligent in several respects. Several requests, prior to the date of the accident, were submitted to Exxon to halt the continued mooring of Exxon barges to the Nichols' barges. (Trial Transcript, p. 20-21). These Exxon barges continually jarred and buffeted Nichols' barges, resulting in damage to the cement casing and deposits of sand on the work surface. Many of the barges were fuel barges, similar to the ones moored on the day of the accident. The welding and other "hot work" necessary on the Nichols'

barges could not commence until these fuel barges were removed. Exxon was aware of the problems created well in advance, yet it took no action to correct the potentially dangerous situation.

The eight fuel barges moored to Nichols' barges were maneuvered there by the tug EXXON PENNSYLVANIA. The captain of the tug, Mr. Elmer Worley, had moored the tow of eight fuel barges to the northernmost of Nichols' barges, the CP-12. The CP-12 was moored to the bank by only one five-eighths (5/8") inch cable. The stress created by the eight fuel barges caused that cable to fray to the point of breaking. Prior to mooring the fuel barges, the Exxon tug captain did not investigate the mooring of the Nichols' barges to determine if they could accomodate the stress created by the fuel barges. Mr. Worley testified he had no personal knowledge of the type of mooring of the

Nichols' barges or the size of the line, and that he did not inspect it. A simple inspection would have revealed the Nichols' barges and the five-eighths (5/8") cable inadequate to the task, and would have precluded the dangerous situation which resulted. It was in direct consequence to the fraying line, due to the weight of the fuel barges, and the negligent oversight by the Exxon tug captain, that plaintiff was compelled to release the line thereby slipping on the accumulation of sand and injuring his back.

Review of the findings of fact of a trial court is governed by the "clearly erroneous" rule of Rule 52, Federal Rules of Civil Procedure. The leading case on scope of review in negligence cases is McAlister v. United States, 1954, 75 S.Ct. 6, 348 U.S. 19, 99 L.Ed 20. Therein this Court held determinations of negligence are reviewed under the "clearly erroneous"

rule of Rule 52. In requesting review by this Honorable Court, plaintiff submits that the finding of the District Court that there existed no negligence by either Exxon or Nichols is clearly erroneous and should be set aside. A short review of the record will reveal there was substantial evidence from which negligence could be found.

There is ample evidence in the record to support a finding of negligence by Exxon and Nichols. The District Court does not even address the negligence of Nichols in failing to provide a safe place to work and failing to maintain the work area free of potentially hazardous sand and other particulate matter. The District Court stated the presence of sand and other particular matter was a "normal" condition on Nichols' barges. Most of the sand and other matter present resulted from damage to the cement encasement of

the pipe on board. Much action was taken by Nichols to prevent damage to the pipe. The pipeline had to be installed in an "undamaged" condition. Damaged pipe nor damaged pipe casing was not a normal condition; consequently, neither was the sand and other matter derived from the damaged pipe a normal condition. Much effort was expended to prevent damage to these joints of pipe, but little or no effort was expended to correct the dangerously slippery condition on the deck created by the sand when the pipe was damaged.

The "normal" presence of sand herein is analogous to the "normal" presence of fish slime on a pier used to unload fish from a fishing boat in Jeter v. Star Fish & Oyster Company, 482 F.2d 457 (5th Cir., 1973). Therein the defendant vessel owner was negligent for not washing off fish slime, a "normal" condition encountered on such piers, prior to the

unloading of the fish. The fish slime caused Jeter to slip and fall. The District Court in Jeter found "no evidence" presented regarding the substance which caused Jeter to fall. The Fifth Circuit held this clearly erroneous and reversed. The same considerations apply herein. The presence of sand and other matter on Nichols' barges was an unwanted condition which could not be characterized as "normal". It clearly contributed to plaintiff's accident and injury by causing him to slip. It is respectfully submitted that the finding of the District Court on this issue is clearly erroneous and should be reversed.

The District Court found no negligence of Exxon or its tug captain. Stated the Court:

> "Now, there is no evidence, as I recall, in this case to indicate that Exxon was in any way negligent by permitting barges to tie up, if they permitted it -- to

> tie up these barges. This accident did not occur because the fuel barges were tied up to the work barges, except in the very remotest sense [sic] that if they had not been there, there would have been no lines to cast off; but this certainly can't be considered as a proximate cause or a cause in fact of this accident." (Transcript, p. 283).

This "finding" completely overlooks the evidence which demonstrated Exxon had prior knowledge of the practice that its barges frequently tied up to Nichols' barges and damaged the pipeline on board, under construction. It completely ignores the actions of the Exxon tug captain, an experienced port pilot, who had no personal knowledge of the moorings of Nichols' barges and who failed to inspect these barges and their moorings prior to tying up eight laden fuel barges thereto. That action, chargeable to Exxon, demonstrated his failure to exercise reasonable care and that degree of maritime skill which prudent navigators employ in performing

similar services. Yet the Court persisted there was "no evidence" Exxon was in any way negligent. Again, plaintiff respectfully submits the findings of the District Court that there was no negligence was clearly erroneous and should be reversed.

The District Court holds the accident herein "did not occur because the fuel barges were tied up to the work barges." Again, plaintiff respectfully submits this is clearly erroneous. As a direct consequence of the stress created by the Exxon fuel barges on the moorings of Nichols' barges, the Nichols' moorings were unraveling and breaking. Responding to this potentially dangerous situation created by Exxon, Mr. Leonard was injured. It is entirely accurate to state the actions of Exxon were a cause in fact of the accident herein. Clearly Exxon had been warned <u>not</u> to tie up to the Nichols' barges because the concrete encased pipe was

breaking, because "hot work" couldn't commence and because the five-eighths (5/8") inch cable wouldn't hold additional vessels.

The District Court finds Mr. Leonard's back injury resulted from "an unstable back" (Transcript, p. 283). The Court infers this unstable back condition was a result of two prior back injuries, one in 1963 and one in 1968. In fact, since the back injury in 1968 until August, 1974, Mr. Leonard had continually been employed in "pipeline and related fields" doing hard and laborious work. (Transcript, p. 213-214). The record shows Mr. Leonard had no trouble or difficulty with his back prior to the accident in August, 1974. Plaintiff respectfully submits the conclusion by the District Court that Mr. Leonard's injury resulted from an "unstable back" is unsupported by the evidence and is clearly erroneous. Mr. Leonard had just completed working on a pipe-laying

barge, prior to coming to work for Nichols. He did not have an unstable back that prevented him from being gainfully employed.

Plaintiff maintains that since his claim under the Jones Act, argued as improperly dismissed, should have been tried to a jury, that body is the proper entity to make findings of fact regarding negligence under the Jones Act. Accordingly, any determination by the District Court as to negligence is improper. Additionally, the standard by which liability and negligence are determined under the Jones Act is not as stringent as the standard applied in a maritime tort or in a diversity action. The Court is familiar with the standard of negligence as "any negligence, however slight" in a Jones Act claim.

Plaintiff respectfully submits to this Honorable Court that the evidence

presented in this case clearly demonstrates negligence by both Nichols and Exxon, contrary to the findings of the District Court. The Fifth Circuit did not even address the merits of the negligence issue.

S U M M A R Y

Threshold questions of status under the Jones Act involving "seamen" and "vessels" have traditionally been, except in "rare cases", questions for a jury. The decision of the District Court and the Fifth Circuit, holding as a matter of law that the structure herein was not a vessel or a "special purpose" craft, flies into the teeth of established jurisprudence wherein there exists genuine issues as to material facts and conflicting inferences could be drawn from underlying facts by reasonable men. The exceptions to these principles have been very narrowly drawn, the evidentiary threshold has consistently been very low, and the

provisions of the Jones Act have traditionally been liberally construed. The decision below contradicts these well established concepts. A principal function of the barges herein involved transportation of numerous pipeline section assemblies, as cargo, across navigable waters. The barges were designed and equipped for use in navigable waters, and were in navigable waters when the accident herein occurred. The characterization and analogy of these barges to a floating dry dock may be appealing, superficially. However, close analysis of the facts within the context of prior jurisprudence reveals disposition of this issue by summary judgment was improper, and that the threshold issue of "vessel" status should have been submitted to a jury.

If the decision of the District Court which granted the summary judgment on the issue of "vessel" status was

correct, defendants, Nichols and Fireman's Fund, should have been dismissed from the suit. The dismissal of these defendants would have resulted in establishment of complete diversity between the plaintiff and the remaining defendant, Exxon. The failure of the District Court to so act in effect "defeated" diversity jurisdiction thereby prejudicing plaintiff's right to a trial by jury as granted by the laws of the United States. Plaintiff asserts that diversity was established as a basis for jurisdiction at the pretrial conference and in the Pretrial Order which Order in effect amends the pleadings. The Court and Exxon were thereby sufficiently appraised of this allegation of jurisdiction and of plaintiff's demand for a trial by jury. Plaintiff further asserts that the jurisdiction of the District Court after the Order was based upon the general maritime

law and diversity; the absence of any designation of plaintiff's claims under Rule 9(h) or any similar identifying statement indicated plaintiff intended the proceedings be governed by the rules applicable to civil actions, including trial by jury, and not by the rules governing civil actions in admiralty. Accordingly, the allegations of negligence by Exxon should have been tried to a jury.

The finding by the District Court that neither Nichols nor Exxon were negligent is clearly erroneous. Nichols had prior knowledge of the dangers and slippery condition created when the concrete casing on the pipeline sections was damaged. Nichols was aware of the damage caused when various barges, especially Exxon's barges, were moored to Nichols' three barge unit. The evidence demonstrated, in addition to Nichols' failure to prevent this practice, Nichols' only infrequently

provided custodial personnel to maintain the barges and remove the sand and particulate matter which accumulated on the barge surfaces and created the dangerous and slippery condition which caused Leonard's accident. Exxon had prior knowledge of the problems and dangerous condition created when its barges were moored to Nichols' barges. The testimony at trial showed responsible Exxon personnel received repeated requests to halt the practice of mooring Exxon barges to Nichols' barges because of the damage and conditions the practice caused. Further, the captain of the tug EXXON PENNSYLVANIA, an experienced port pilot, acknowledged he had no knowledge of the type of mooring securing Nichols' barges to the bank and that he did not inspect these mooring lines in order to determine if they were sufficiently strong to accomodate the weight of the fuel-laden Exxon barges. In

spite of evidence and testimony which demonstrated these acts of negligence, the District Court stated there was no negligence by either Nichols or Exxon. This finding is clearly erroneous, even within the narrow scope and strict construction applied to that phrase, and should be reviewed by this Honorable Court, pursuant to Rule 52, Federal Rules of Civil Procedure, and reversed.

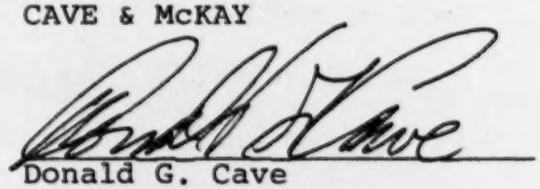
C O N C L U S I O N

It is respectfully suggested that a Writ of Certiorari issue, directed to the Fifth Circuit Court of Appeals, in order that this Court consider the decision of the Fifth Circuit in the case at bar as this decision is in conflict with decisions of the Fifth Circuit and other courts of appeal on the same matter, and has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower

court in a Jones Act case as to call for an exercise of this Court's power of supervision.

Respectfully submitted:

CAVE & McKAY



Donald G. Cave
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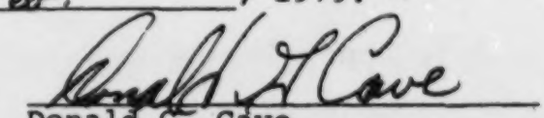
C E R T I F I C A T E

I hereby certify that three copies of the foregoing has been mailed this date, postage prepaid, to all counsel of record: Boris F. Navratil, P. O. Box 3197, Baton Rouge, Louisiana 70821; Richard A. Chopin, P. O. Box 60626, New Orleans, Louisiana 70160; and James C. Dixon, P. O. Box 15782, Baton Rouge, Louisiana 70815.

Baton Rouge, Louisiana, this 23 day of Feb., 1979.



Donald G. Cave

APPENDIX A

COURT OPINION

Before GEWIN, GODBOLD and MORGAN, Circuit Judges

LEWIS R. MORGAN, Circuit Judge:

On August 26, 1974, Wesley Leonard was injured while working on a floating construction platform moored to the bank of the Mississippi River near Baton Rouge, Louisiana. Suit was filed alleging three theories of recovery: the Jones Act, 46 U.S.C. § 688 (1976); unseaworthiness of the platform; and maritime tort. Named as defendants were Nichols Construction Company, Leonard's employer, Fireman's Fund, Nichols' insurer, and Exxon Corporation. Determining that the construction platform was not a vessel, the court below granted summary judgment against Leonard on the Jones Act claim. With regard to plaintiff's remaining claims, judgment was entered for defendants following trial by the court.

In this appeal, Leonard asserts that the trial court erroneously granted summary judgment, ruling that the platform was not a vessel, and further that the remaining claims should have been tried by a jury. Finding no error, we affirm.

On numerous occasions this court has struggled with the problem raised by Leonard's first contention - what is a vessel? As Judge Wisdom succinctly pointed out, there may be no precise answer:

> Attempts to fix unvarying meanings have a firm legal significance to such terms as 'seaman,' 'vessel,' 'member[s] of a crew,' must come to grief on the facts. These terms have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case.

Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Thus has evolved the general rule in this circuit that such issues are sent to the jury:

> (1) [I]f there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel, and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779. Because of the policy of providing an expansive remedy for seamen, submission of Jones Act claims to a jury requires a very low evidentiary threshold; even marginal claims are properly left for jury determination. Barrios v. Louisiana Construction Materials Company, 465 F.2d 1157, 1162 (5th Cir. 1972).

With this general approach in mind, we consider the structure on which Leonard was injured. The platform consisted of four flat-deck barges. These barges were

not self-propelled, and could be moved only by the application of some external source of power. Three of the barges were placed end to end and lashed securely together. According to the trial court, this three-barge structure was moored "more or less permanently" to the shore by separate steel cables. The fourth barge, which served as a crane platform and as an access ramp to the other three barges, was located between the shore and the remaining barges. This fourth barge was connected to shore by a wooden ramp. To permit the crane to service each of the three outer barges, the three-barge platform would occasionally be untied and moved slightly forward or backward until properly positioned.

This court has previously held that a similar floating construction platform, which was neither designed for navigation nor engaged in navigation at the time of the accident, was, as a matter of law, not

a vessel under the Jones Act. Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973). In Cook, as in the instant case, the barges were afloat, but that fact alone was not determinative of status. See also Blanchard v. Engine and Gas Compressor Services, Inc., 575 F.2d 1140 (5th Cir. 1978). Because appellant's proffered distinctions between Cook and the instant case are unpersuasive, and because we can find no material differences between the two cases, we are compelled to uphold the determination below that Leonard was not injured on a vessel. Accordingly, summary judgment was properly granted on that issue. Nonetheless, we note that Cook and now the instant case deviate from the general practice permitting Jones Act issues to be submitted to the jury, and accordingly should be applied restrictively.

Appellant next contends that the remaining counts should have been tried by a

jury, rather than by the court. Appellant concedes that his original complaint asserted only maritime claims, for which no jury trial would have been available. However, pointing to the pretrial order, which mentions diversity as a possible basis for jurisdiction, and to a brief colloquy at trial in which plaintiff requested reconsideration of the denial of the jury request, appellant asserts that the court and defendant had adequate notice of appellant's intention to abandon the admiralty claims and proceed solely in diversity, seeking recovery for negligence. We need not speculate about possible justifications for appellant's indirect attempts to provide notice rather than filing a formal motion because, in any event, there was no complete diversity between the parties. According to the complaint, both Leonard and the defendant Nichols were Louisiana residents. Thus,

the trial court properly proceeded in admiralty. Appellant's other arguments on appeal are without merit and need not be discussed.

AFFIRMED.

GODBOLD, Circuit Judge, dissenting:

I believe that whether the construction platform was a vessel was a jury issue and not properly decided on summary judgment as an issue of law.

The trial court and this court stand on Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (CA5, 1973). The plaintiff in Cook was working on a single barge moored to the dock by ropes and used as the site for fabricating concrete barges. During fabrication the barge-platform was moved from time to time along the dock to pick up materials. Upon completion of construction of a concrete barge the platform would be towed a short distance into deeper water for launching the newly built

barge. Plaintiff Cook was a carpenter engaged in erecting forms on the platform preparatory to pouring concrete for a barge under construction. The district court granted summary judgment for the defendant on the ground that the platform was not a vessel.

The underpinning of Cook is the analogy of the barge-platform to a dry dock used as a site for shipbuilding and to the plaintiff's activity thereon as a shipbuilder. In the present case four barges floating in the Mississippi River were being used as a site to weld together pipes into a completed pipeline and to transport the pipeline to its proposed location, a short distance away, and to lay it under navigable waters of the Mississippi where it would connect a fuel unloading point in the river with Exxon's shore facility.

The platform on which plaintiff was injured consisted of a "crane barge,"

moored lengthwise along the bank and connected to the bank by a ramp of boards and dirt. Outward from the "crane barge" were three other barges, lashed together end-to-end in a three-barge string parallel to the bank. Steel cables ran from the string of barges to dolphins on the bank. The crane on the shoreward barge was used for material handling, and this crane barge also was the means of access to the string of barges offshore. Actual work of welding the pipes was done on the offshore barges. Several times during fabrication the offshore string of barges was moved so that the crane on the shoreward barge could reach places of work on the offshore barges.[1]

1/The terms "platform" and "site" are used as convenient shorthand words without substantive significance. They convey neither more nor less permanence and unity to the four-barge operation than the facts impart.

It is not clear to me whether the outward string of three barges, lashed together, were connected in any manner to the crane barge or simply moored offshore of its and adjacent to it.

The work being done on the outward barges, welding pipe, does not have the same connexity to shore as does shipbuilding - it can as well be done aboard a ship as ashore. Once the pipeline had been fabricated the string of offshore barges was towed into deeper water, and the assembled pipeline was slipped off into its destined place underneath the navigable waters of the Mississippi. The assembled pipeline was in a traditional sense cargo, transported (albeit a short distance) through navigable waters to its destined location underneath navigable waters. This transportation function necessarily had to be performed by a moving vessel. The barge fabricated in Cook was not cargo in the traditional sense, and the manner of launching it was a matter of convenience rather than necessity.

Also the activity carried on by the plaintiff and the manner in which he was

injured distinguish this case from Cook. Plaintiff was employed by the pipeline fabrication contractor and was in general charge of the job being done by contract with Exxon. Over a weekend eight Exxon fuel barges moored along the exposed side of the three-barge string. They tied up to a dock nearby and also put two lines to one or more of the offshore barges. When plaintiff arrived on Monday he noted the presence of the fuel barges and went aboard the fabrication barge string. He found that the steel cable running from one of these offshore barges to a dolphin ashore was unraveling and breaking. He feared that the strain imposed by the fuel barges, and their weight, and the wash of the current, would cause the line to break.

This was not the first time fuel barges had tied up to the offshore string, and those working on the fabrication barges objected to this because it pulled the

fabrication barges away from the bank and tended to break the lines tying them to the bank. Also it caused the fabrication barges to buffet and slam against each other, which in turn dislocated and damaged the pipes on board.

A tug was called to remove the fuel barges. When the tug arrived it was suggested to plaintiff that the two lines from the fuel barges to the offshore string be untied. While plaintiff was engaged in untying one of these lines he was injured. Thus the purpose of plaintiff's activity at the moment of his injury involved disengaging the fuel barges from their mooring to the offshore string of barges because the mooring exposed the offshore barges to the perils of navigable water. The chief peril from which plaintiff was protecting the barges was the possibility that the unraveling barge-to-shore cable would break and the lashed-together string

of barges would be carried away by the current. Also he was protecting the barges from a repetition of what had occurred in the past, the barges being banged and buffeted together with the result of damage to them and to the pipe stacked aboard.

Under these circumstances I think Cook is not controlling as a matter of law. Under the low threshold to which the majority opinion refers, the jury should have determined whether plaintiff was injured on a vessel.[2]

The defendant answers the conditions and circumstances which I have described with the disingenuous argument that the trial court disregarded as not believable plaintiff's testimony that an emergency

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2/It is obvious that the majority are not quite comfortable with the conclusion they reach, since they say: "[W]e note that Cook and now the instant case deviate from the general practice permitting Jones Act issues to be submitted to the jury, and accordingly should be applied restrictively."

situation existed which caused him to cast off the mooring line from fuel barges to the floating barge string. The short answer to this is, of course, that credibility is an issue for the jury and not for the trial judge on summary judgment.

APPENDIX B

DENIAL

December 4, 1978

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

EDWARD W. WADSWORTH
Clerk

CAPTION DELETED

APPENDIX C

MINUTE ENTRY:
MARCH 31, 1976
WEST, J.

This matter is before the Court on the motion of the defendant, Nichols Construction Corporation, and Fireman's Fund Insurance Company for summary judgment on the ground that this suit is not maintainable within the admiralty jurisdiction of this Court. It is the contention of the defendants that the barge on which the plaintiff was working at the time of his injury was not a "vessel in navigation" and that therefore this case is not maintainable within the admiralty jurisdiction of the Court. The structure on which the plaintiff was allegedly injured was an assembly barge comprised of three barges lashed together, end to end, by steel cables and moored, more or less permanently, to the river bank by separate cables.

There was a fourth barge anchored between the construction barge assembly and the shore to serve as a platform for a crane and as an access ramp to and from the construction barge. This assembly barge was being used by Nichols Construction Corporation while constructing a pipeline assembly for Exxon Corporation to facilitate the loading and unloading of petroleum products at the Exxon refinery. These barges were not in navigation nor were they designed for transportation of passengers, cargo or equipment from place to place across navigable waters. It is true that they were, periodically, moved during the course of construction to facilitate the crane's access to the different parts of the assembly platform. This was accomplished simply by loosening the mooring cables secured to the shore dolphins, and then pushing the total platform up river with an Exxon tug and then readjusting and tightening the

mooring cables. These moves were performed, when necessary, by Nichols personnel. This moving of the barge assembly in no way amounted to "vessels in navigation." See Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (CA 5 - 1973). Thus, this barge assembly not being a "vessel in navigation" the plaintiff cannot maintain this claim under the Jones Act or under the doctrine of unseaworthiness. Insofar as the plaintiff's claims are based upon the Jones Act or unseaworthiness, they must be dismissed. However, the plaintiff also alleges general maritime negligence as a cause of his injury. As this record now stands, the Court cannot say that there clearly is a lack of significant relationship between the alleged tort and traditional maritime activity. At the present time, this is a factual issue which prevents summary disposition. Therefore, for these reasons:

IT IS ORDERED that the motion of the defendants for summary judgment insofar as plaintiff's claim is based upon the Jones Act and the doctrine of unseaworthiness be, and it is hereby GRANTED, and plaintiff's case as to those two claims is DISMISSED, reserving, however, to the plaintiff his right to pursue his claim insofar as it is based upon an allegation of general maritime negligence.

E. Gordon West
UNITED STATES
DISTRICT JUDGE

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

These remarks will be considered my findings of facts and conclusions of law, reserving to the Court the right to redo them if it wishes to do so, or if it becomes necessary to do so without in any way changing the general content or meaning of the findings of facts and conclusions of law.

This case involves an accident which occurred on -- allegedly occurred on August 26, 1974. When this suit was originally filed, the plaintiff filed suit against Exxon Corporation and also against Nichols Construction Company and certain insurers of these parties, and alleged in the original complaint that suit was brought under maritime law and that suit was brought under the Jones Act, also brought for unseaworthiness and general

maritime law.

Later on, in the pre-trial order, while in the beginning in the pretrial order it again reiterates the fact that the case is founded in maritime law, there is later on a vague jurisdictional allegation that the suit is also brought as a diversity suit because of the fact that plaintiff has sued both Exxon and Nichols Construction Company and alleged affirmatively that Nichols Construction Company was a citizen of the State of Louisiana, thus destroying any possible diversity that could have existed. So the case was not considered by the Court to be a diversity case.

In some of the prior proceedings, the court granted motions to dismiss the Jones Act claim and the unseaworthiness claim for written reasons that were placed in the record, reserving to the plaintiff the right to proceed with his action

against one or both of the parties based entirely on maritime negligence.

Thereafter, motion of the defendant for a denial of the request by plaintiff for trial by jury was granted on the ground of the court already having found that there was no diversity involved, having found that there was no Jones Act involved, having found that the only basis for the claim -- that the only possible claim could be maritime negligence; and maritime negligence did not permit or require trial by jury. Consequently the case proceeded to trial before the court without the intervention of a jury on the basis of alleged maritime negligence.

Now, the statement of the accident in this case is very simple to make, because the best evidence, of course, of the way the accident happened would be the plaintiff's own version rather than having to speculate from evidence presented by others

who testified for the plaintiff, but who readily admitted that they did not see the accident.

Plaintiff's accident can be summed up in this way: Plaintiff was attempting to cast off a line that originated with the oil barges that were tied up to the pipe or work barges, the eye of the line being over a cavil or cleat located on the work barge; that as the plaintiff bent down to disengage the eye of the line from the cleat or the cavil, and attempted to cast it off the work barge, he felt a burning sensation in his back which apparently resulted or was the manifestation of the injury about which he now complains.

While there has been some testimony in this case concerning sand or some such substance on the deck of the work barge, the Court considers this to be totally and completely inconsequential for two reasons: first of all the plaintiff's version of

the accident certainly in no way attributes the pain or catch in his back to any sand on the deck, he attributes it to the act of bending over and picking up or lifting off or casting off of the line in question. Secondly, there is ample testimony in the record that the so-called sand came off these concrete coated pipes and was a normal customary condition on the barge and not one which was causing anyone any trouble.

There has been some testimony in the record that all of a sudden, there was a dire extreme emergency that arose; that everyone turned and ran from the vessel, the barge, the work barge. Of course, the Court places no credence in that testimony and simply doesn't believe it.

Plaintiff has been forthright with his testimony that the reason for the work stoppage that morning was not the odor of gas nor was it any visible leakage of gas,

but was solely and entirely because of bad weather. It rained and they had to quit working. This is borne out, of course, by the fact that the plaintiff did have in his possession a "hot work" permit which had been issued some time prior to eight o'clock that morning.

The court discounts as not worthy of belief the testimony in this case to the effect that there was such an odor of gas and such a visible leakage of fuel around the area that everybody had to, in essence, run for their lives. The court simply does not believe that testimony.

The source of that testimony further makes it unbelievable because these same witnesses testified that these barges, fuel barges, remained tied up to the work barges for apparently the better part of the day of August 26, 1974, and that obviously was not so. The log of the vessel Exxon Pennsylvania shows the removal of

those barges commencing some time around eight A.M. and being completed some time around nine A.M. that morning; and this fact is borne out by the testimony of the plaintiff himself, who says that his accident occurred around eight o'clock, as the tug Exxon Pennsylvania was approaching the fuel barges and in answer to the Court's question, stated that they were removed completely from the site by approximately nine o'clock in the morning. I take that to be the corroborated and proper testimony in the case.

So this brings us down to the question of what caused the accident and by what negligence and by whose negligence, if any, did this accident occur? The only possible negligence that this Court can see -- or rather to put it differently -- the only negligence that plaintiff claims by evidence to have occurred in this case, seems to be the tying up of the fuel barges to

the Nichols Construction Company work barges or pipe barges. There is evidence in the case to indicate that Nichols did not want barges tied up to their work barges, that this has happened before, that they had been requested not to do so and that in this instance there is at least some evidence that work on pipe barges was not to proceed as long as these barges were tied up to these work barges. Now, there is no evidence, as I recall, in this case to indicate that Exxon was in any way negligent by permitting barges to tie up, if they permitted it -- to tie up to these barges. This accident did not occur because the fuel barges were tied up to the work barges, except in the very remotest sense that if they had not been there, there would have been no lines to cast off; but this certainly can't be considered as aproximate cause or a cause in fact of this accident.

The evidence in this case is clear, both from the medical history of plaintiff, and from plaintiff's own testimony, that he had sustained two prior back injuries quite some time ago, one in 1963 and one in 1968, both of which resulted in surgery apparently for correction of herniated disks; and there is no doubt from the evidence, despite the fact that the plaintiff was able to do certain work, that he did have what is referred to as an unstable back. An unstable back, of course, is more susceptible to injury than is a perfectly sound back and that fact is amply indicated and borne out by what happened in this case.

Now, some of the evidence in this case was introduced, I'm sure, for the purpose of trying to establish the fact that this accident was the result of an emergency; that that emergency was caused by the unravelling or fraying of a mooring line that secured the upriver end of the

pipe or work barges to a dead-man on shore. The evidence was apparently designed to show that there was some unravelling of this line and that the plaintiff saw it and felt the necessity of casting off the tied up fuel barges before the tug Exxon Pennsylvania got too close alongside because he feared that the approach of the Pennsylvania might cause currents that would cause the fuel barges to place an undue strain on the pipe barges' mooring lines and that because he felt that this might happen, that he thought it wise to cast off the line tying together the pipe barges and the fuel barges.

Now, this may well have been the reason for the attempt to cast off these lines, and the Court has no reason to doubt that this was the motivation for the plaintiff to attempt to cast these lines off. But according to the plaintiff's own testimony, and I quote, "there was no emergency, it

could have happened to anyone; maybe it was just a freak accident."

I dare say that whether the mooring line was fraying or not, the mere fact that the barges had to be moved would have required these lines to have been cast off, and I dare say that had the plaintiff been there as he was, he would have cast these lines off so that the tug could remove the fuel barges, because after all the plaintiff was the supervisor and was charged with the operation of the barges and they did not like to work with the barges attached -- the fuel barges attached, that is.

And I think it could probably be concluded that had it happened that way, the very same result would have occurred that did, in fact, occur, that is that when the plaintiff bent down to cast off this mooring line, he hurt his back. I fail to see the evidence in this case that could in

any way be considered to constitute negligence on the part of anyone which could be considered a proximate cause or a cause in fact, or any other kind of cause of this accident.

I don't believe the plaintiff was negligent. I believe that the plaintiff was doing what anyone else in his position would have done, whether the line was fraying or whether it was not fraying. I believe that the plaintiff unfortunately had a bad back and when he attempted to cast off this line, he strained his back. This is not an uncommon occurrence. I know of an instance not long ago, where a person with an unstable back simply bent over to tee off a golf ball and they had to carry him off the golf course and he was in bed for goodness knows how long. So it's not an uncommon occurrence for a person with a bad back to aggravate it and have a problem by the slightest unusual motion. The motion

through which the plaintiff went to perform this particular task was certainly not the result of negligence on the part of anyone, including himself.

I am convinced that the evidence in this case does not warrant a finding of negligence on the part of Exxon Corporation nor on the part of Nichols Construction Corporation. I find that there is no evidence in this case to indicate any negligence on the part of the plaintiff. I find that plaintiff's injured back resulted from his normal and usual work and operation, without the intervention of negligence on the part of anyone.

And, of course, as a matter of law, absent a showing by a preponderance of evidence that there is negligence on the part of the defendant, the defendant may not, of course, be cast in judgment.

It is therefore the judgment of this Court that there be judgment herein in

favor of both defendants, all defendants, including the insurance companies made defendants, and against the plaintiff, dismissing the suit in its entirety at plaintiff's costs.

That will constitute the findings of fact and conclusions of law, gentlemen, and as I say, if there is need -- if the court feels the need to redo them in any way, it will do so -- it reserves the right to do so; but it will not necessarily change them; and anyone that needs those findings and conclusions for the purpose of appeal or any other purpose, may get them by way of a transcript from the Court Reporter.

All right, gentlemen, Court will be at recess.

(Whereupon Court adjourned for the day.)

J U D G M E N T

This cause came before the Court for trial, Honorable E. Gordon West, District Judge, presiding, and the issues having been heard and the Court having duly rendered a decision for oral reasons assigned,

IT IS ORDERED AND ADJUDGED that judgment be entered herein in favor of defendants, Exxon Corporation, Nichols Construction Corporation, and Fireman's Fund Insurance Company, and against plaintiff, Wesley J. Leonard, dismissing plaintiff's suit at his cost.

Baton Rouge, Louisiana, June 15, 1976

Charles H. Banta
CLERK

APPROVED:

E. Gordon West
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1350

WESLEY J. LEONARD,
Petitioner,

v.

EXXON CORPORATION and/or
NICHOLS CONSTRUCTION CORPORATION, and
FIREMAN'S FUND INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Exxon Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 581 F. 2d 522.

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QUESTIONS PRESENTED

I. WHETHER CONSTRUCTION BARGE CP-12 WAS A "VESSEL" FOR MARITIME JURISDICTIONAL PURPOSES?

II. WHETHER PLAINTIFF WAS ENTITLED TO A TRIAL BY JURY?

III. WHETHER THE SUPREME COURT OF THE UNITED STATES SHOULD REVIEW CONCURRENT FINDINGS OF FACTS BY THE DISTRICT COURT AND THE COURT OF APPEALS?

STATEMENT OF THE CASE

This is an action for personal injuries allegedly sustained by Wesley J. Leonard, an employee of Nichols Construction Corporation [Nichols] on August 26, 1974. The accident allegedly occurred at a construction project site on the edge of the Mississippi River near the Exxon refinery in Baton Rouge, Louisiana. Plaintiff brought suit against Nichols for negligence under the Jones Act and unseaworthiness under the General Maritime law and against Exxon Corporation [Exxon] for negligence under the General Maritime law.

Nichols was under contract with Exxon to build a pipeline assembly and Leonard was the foreman of one of the Nichols' crews. The work was being performed on four barges that were strung together and moored to the shore adjacent

to the Mississippi River. Three barges were moored together end to end and a fourth barge with a crane was moored between the three construction barges and the shore. A more or less permanent access ramp made of dirt and mats ran from the edge of the shore to the crane barge. Plaintiff alleged that Exxon moored fuel barges in the work area with two lines running to the construction barges and he was in the process of untying these lines when his alleged accident occurred.

Nichols and Fireman's Fund Insurance Company moved for summary judgment based on the grounds that the barge on which the plaintiff was allegedly injured was not a vessel. Nichols demonstrated the manner in which the construction barges were moored together and to the river bank. Nichols also showed the existence of the ramp to

and from the construction barges and established that the purpose and function of these barges was not navigation. In addition, Nichols proved that the barges were not designed for the transportation of passengers, cargo or equipment from place to place across the navigable water. The trial court granted the motion dismissing the Jones Act claim and gave its reasons in the Minute Entry of March 31, 1976.

Exxon filed a motion to strike plaintiff's request for trial by jury on the grounds that plaintiff's remaining claims were based upon general maritime negligence which does not provide a right to a jury trial. This motion was granted on June 7, 1976.

The matter proceeded to trial on June 14 and 15, 1976. The Court found no negligence on the part of Exxon, or

any other party, and dismissed the matter at plaintiff's cost. The Court found that the accident occurred when Leonard bent over to cast off a line. The medical evidence established that the plaintiff had two prior back operations and was more susceptible to injury than a person with a stable back. In its findings of fact and conclusions of law, the District Court stated:

> "I fail to see the evidence in this case that could in any way be considered to constitute negligence on the part of anyone which could be considered a proximate cause or a cause in fact, or any other kind of cause of this accident."

On appeal, the Fifth Circuit Court of Appeals affirmed the trial court's denial of vessel status as well as the Court's holding that plaintiff was not entitled to a trial by jury. The Fifth Circuit also found that the negligence issue and other contested

matters on appeal were not worthy of consideration. In addition, the Court of Appeals denied plaintiff's request for a rehearing of this matter.

Finally, the plaintiff filed this Petition for Writ of Certiorari in which he requests this Honorable Court to review the District Court's factual findings regarding the negligence issue. In addition, he asks the Court to review the consistent legal conclusions reached by the District Court and the Fifth Circuit concerning the issues of vessel status and the right to a trial by jury.

REASONS FOR DENYING THE WRIT

I. THE CONSTRUCTION BARGE CP-12 WAS NOT A "VESSEL" FOR MARITIME JURISDICTIONAL PURPOSES

It is axiomatic that a floating dry dock does not constitute a vessel for maritime jurisdictional purposes. Cope v. Vallet Dry-Dock Company, 119 U.S. 625, 7 S. Ct. 336 (1887); Atkins v. Greenville Shipping Corporation, 411 F.2d 279 (5th Cir. 1969), cert. den'd. 396 U.S. 846, 90 S. Ct. 105 (1969).

In Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973), cert. den'd. 414 U.S. 868, 94 S. Ct. 175 (1973), this rule was extended to a construction platform which was "legally indistinguishable" from a floating dry dock. The structure involved in Cook functioned primarily as a stationary construction platform which was secured to the dock

by ropes during the construction process. It was a flat deck barge with no motor power of its own and could be transported only by the use of tugboats or land-based cranes. The platform would occasionally be moved to different positions along side of the defendant's dock in order to pick up materials. In addition, the structure would periodically be towed a short distance for launching purposes upon completion of the construction work. The Fifth Circuit considered these factors and held that the structure was "legally indistinguishable" from a floating dry dock and therefore not a "vessel" for maritime jurisdictional purposes. Cook at 1000.

In Leonard v. Exxon Corporation, 581 F.2d 522 (5th Cir. 1978), the Fifth Circuit specifically stated that no material difference existed between the structures involved in Cook and the case

at hand. The Leonard Court described the structure before it as a platform consisting of four flat-deck barges which were not self-propelled and could be moved only by the application of some external source of power. Three of these barges were lashed together and moored to the shore by separate steel cables. The fourth barge was located between the shore and the other three barges and was connected to shore by a wooden ramp. This barge served as a crane platform and as an access ramp to the remaining barges. Leonard at 524.

After describing the structure upon which Mr. Leonard was allegedly injured, the Fifth Circuit stated:

> "This court has previously held that a similar floating construction platform which was neither designed for navigation nor engaged in navigation at the time of the accident, was, as a matter of law, not a vessel under the Jones Act. Cook v. Belden Concrete

> Products, Inc., 472 F.2d 999 (5th Cir. 1973). In Cook, as in the instant case, the barges were afloat, but that fact alone was not determinative of status. See also Blanchard v. Engine and Gas Compressor Services, Inc., 575 F.2d 1140 (5th Cir. 1978). Because appellant's proffered distinctions between Cook and the instant case are unpersuasive, and because we can find no material difference between the two cases, we are compelled to uphold the determination below that Leonard was not injured on a vessel." Leonard at 524. (Emphases added.)

Inasmuch as the Fifth Circuit has succinctly analyzed the controlling jurisprudential precedent, Exxon Corporation defers to the wisdom of that Honorable Court and submits that construction barge CP-12 was not a "vessel" for maritime jurisdictional purposes.

II. PLAINTIFF WAS NOT ENTITLED TO A TRIAL BY JURY

Once the plaintiff's Jones Act claim failed, the only remaining jurisdictional basis contained in his complaint

was maritime negligence. Plaintiff does not contest the well settled principle that such general maritime claims do not warrant a trial by jury. Romero v. Bethlehem Steel Corporation, 515 F.2d 1249 (5th Cir. 1975); Watz v. Zapata Offshore Company, 431 F.2d 100 (5th Cir. 1970). Rather, the plaintiff asserts that he was entitled to a jury trial because his claim was based on diversity of citizenship.

It is a long standing precedent that a plaintiff's citizenship must be diverse to the citizenship of each defendant in order to invoke the diversity jurisdiction of a federal court. Strawbridge v. Curtiss, 3 Cranch 267, 2 L.ED. 435 (1806). As the Fifth Circuit pointed out in the case at bar, complete diversity did not exist because the plaintiff, Mr. Leonard and defendant, Nichols Construction Company were both citizens of Louisiana.

Leonard, supra, at 524. Consequently, the plaintiff was not entitled to a jury trial and the District Court properly proceeded in admiralty.

It must be noted that the plaintiff never pled diversity as a possible jurisdictional basis. Instead, he relied on a pretrial order and a "brief colloquy" at trial to serve as notice to the Court and defendants that he was abandoning his admiralty claims and proceeding solely in diversity. Leonard at 524. A similar situation existed in Romero, supra, where the court stated:

> "The mere addition of diversity as a jurisdictional ground in the pretrial order - especially when no attempt was made to delete the sentence stating that '[t]he basis for jurisdiction is the admiralty and maritime jurisdiction' - is thus utterly insufficient to notify the court or the opposing party of the purported decision to amend the complaint." (Citations omitted.) Romero at 1252. (Emphasis added.)

The Fifth Circuit went on to state:

> "The effect of appellant's inaction, however, was to leave the jury issue in doubt right up to the day of trial. In these circumstances the trial judge would have correctly exercised his discretion in refusing to empanel a jury. Therefore, whatever appellant's theory, this case was properly tried without a jury." Romero at 1254. (Emphasis added.)

In light of the foregoing, it is clear that the plaintiff was not entitled to a trial by jury. When the plaintiff's Jones Act claim failed, the only remaining jurisdictional basis contained in the complaint was general maritime law. The plaintiff did not attempt to amend his complaint to include diversity jurisdiction and even if he had, it is clear and uncontradicted that complete diversity of citizenship did not exist and the plaintiff was therefore not entitled to a jury trial.

III. THE SUPREME COURT OF THE UNITED STATES SHOULD NOT REVIEW CONCURRENT FINDINGS OF FACT BY THE DISTRICT COURT AND THE COURT OF APPEALS

It is a settled rule of this Honorable Court that it will not review concurrent findings of fact by two courts "in the absence of a very obvious and exceptional showing of error." United States v. Lovasco, 431 U.S. 789, 799, 97 S. Ct. 2044, 2053 (1977); Berenyi v. Immigration Director, 385 U.S. 635, 87 S. Ct. 666, 670. Both the District Court and the Fifth Circuit fully considered and correctly decided the factual issues at hand. In fact, the Fifth Circuit found plaintiff's argument regarding erroneous factual findings of the lower court to be "without merit" and declined to discuss the issue. Leonard at 524.

Since the plaintiff has not illus-

trated a "very obvious and exceptional showing of error," the factual determinations of the District Court, which were affirmed by the Fifth Circuit, need not be reviewed by this Honorable Court.

CONCLUSION

It is respectfully submitted that the courts below fully considered and correctly decided all relevant legal and factual issues. The Fifth Circuit in Leonard relied on established legal precedent and its holding is consistent with the decisions of other circuits dealing with similar matters. Consequently, there are no pressing issues which warrant

review by this Honorable Court and plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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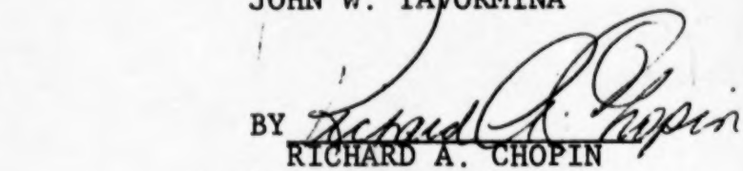
BY 
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CERTIFICATE

I hereby certify that three copies of the foregoing have been mailed this date, postage prepaid to all counsel of record: Donald G. Cave, 7465 Exchange Place, Baton Rouge, Louisiana 70806; Boris F. Navratil, P. O. Box 3197, Baton Rouge, Louisiana 70821; and James C. Dixon, P. O. Box 15782, Baton Rouge, Louisiana 70815.

New Orleans, Louisiana, this 28 day of March, 1979.

Richard A. Chopin

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